R & H Coal Company, Inc. *and* United Mine Workers of America, District 28. Case 11–CA–14047

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On March 16, 1992, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

We agree with the judge that the strike called by the Union on April 10, 1989, was an unfair labor practice strike from its inception and that the Respondent violated Section 8(a)(1) and (3) by failing to reinstate unfair labor practice strikers on their tender of an unconditional offer to return to work. In finding that the Respondent's commission of unfair labor practices was a contributing cause of the strike, we note the following factual context and sequence of events that led to the Union's decision to strike the Respondent.

Commencing March 1988, the Respondent unilaterally changed the terms and conditions of employment of its employees with respect to wages, health insurance, personal or sick leave, and holidays, and dealt directly with employees in setting new wage scales in violation of Section 8(a)(1) and (5) of the Act.[1] At the hearing in the instant proceeding, Judith Scott, associate general counsel for the International Union, testified without contradiction[2] that International Union President Richard L. Trumka decided not to authorize a strike to protest these unfair labor practices until April 1989, because the International Union was concerned that strike action before that date could spread beyond the Respondent to a major employer in the coal industry, the Pittston Corporation and its affiliates.[3] Scott testified that the International Union was not ready to strike Pittston prior to April 1989 and that a strike against the Respondent and other smaller operators effectively could jeopardize the timing of any action against Pittston if the strike had an undesired ''spillover'' effect. Accordingly, instead of calling a strike against the Respondent in 1988, the International Union kept abreast of ongoing conditions at the Respondent's facility and pursued unfair labor practice proceedings against the Respondent through local counsel.

Thereafter, in the spring of 1989, the International Union decided that conditions were feasible for commencement of a strike against Pittston. On April 5, 1989, the International Union struck Pittston. Scott testified that once the fear of a ''spillover'' onto Pittston was no longer applicable, the International Union reviewed the status of the pending unfair labor practice proceeding against the Respondent and directed that an unfair labor practice strike commence. On April 10, 1989, International President Trumka, by telegram to the local union, directed that a strike commence against the Respondent in protest of the Respondent's unfair labor practices. At this time, the unfair labor practices committed by the Respondent the previous year remained unremedied. Picket signs displayed at or near the Respondent's mine road entrance bore the legend ''Unfair Labor Practice Strike.''

In these circumstances, we find that a contributing cause of the strike against the Respondent was its commission of unfair labor practices.[4] Although the International Union did not call a strike for some 13 months after the Respondent's unfair labor practices, this delay credibly was explained by Scott as essentially a strategic decision by the International Union to avoid potential interference with the timing of its strike against Pittston. Further, notwithstanding the delay, the Respondent's unfair labor practices remained unremedied when the strike commenced; the International Union's telegram authorizing the strike expressly referred to the Respondent's unfair labor practices; and, the picket signs displayed at the Respondent's premises also referred to the Respondent's unfair labor practices. Accordingly, when the Respondent's striking employees tendered an unconditional offer to return to work on March 23, 1990, they occupied the status of unfair labor practice strikers[5] and the Re-

[1] By unpublished Order of July 11, 1989, the Board adopted the May 22, 1989 decision and recommended Order of Administrative Law Judge Bernard Ries in Case 11–CA–12750 finding these violations. The Board's Order was enforced on January 30, 1990, by unpublished order of the United States Court of Appeals for the Fourth Circuit.

[2] Although the judge did not set forth Scott's uncontradicted testimony in his decision, he implicitly credited her testimony by virtue of his finding that the International Union authorized an unfair labor practice strike based on the Respondent's unfair labor practices.

[3] The Respondent was a lessee of a Pittston affiliate.

[4] See generally *C-Line Express*, 292 NLRB 638 (1989).

[5] The Respondent contends that its employees did not strike over unfair labor practices and that the strike ''was a pretext for activity against Pittston.'' Although the *timing* of the strike clearly was influenced by the timing of the strike against Pittston, the evidence shows that the Respondent's employees had little or no role in the decision to strike the Respondent, that the International Union controlled the decision whether and when to strike, and that the Respondent's commission of unfair labor practices was a contributing reason in reaching that decision. Moreover, evidence presented by the Respondent to show that some employees felt they were striking because of the Respondent's involvement with Pittston was contradictory and inconclusive. Thus, for example, although employee Eugene Elkins testi-

spondent's failure promptly to reinstate them thereby violated Section 8(a)(1) and (3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, R & H Coal Company, Inc., Jewell Ridge, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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fied that a representative of the International Union stated that the Union had to ''check'' the Respondent's involvement with Pittston before calling a strike, Elkins also testified that, in his view, the reason for the strike was because the Respondent was not paying union wages. In this regard, we note that one of the unlawful unilateral changes made in Case 11–CA–12750 pertained to employee wages.

Patricia L. Timmins and *Joseph T. Welch, Esqs*., for the General Counsel.

Charles L. Woody, Esq. (Spilman, Thomas, Battle & Klostermeyer), of Charleston, West Virginia, for the Respondent.

James J. Vergara Jr., Esq. (Vergara & Associates), of Hopewell, Virginia, for the Charging Union.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. The charge was filed by the Union on September 17, 1990, the complaint issued on November 1, and the trial was in Princeton, West Virginia, on March 7, 1991. The issue is whether, in failing to reinstate approximately 17 striking employees, Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed all parties, I make the following

FINDINGS OF FACT AND ANALYSIS

Respondent, a corporation holding a lease from a subsidiary of the Pittston Corporation, employs about 20 miners in the operation of a coal mine near Jewell Ridge, Virginia, from where it annually ships coal products valued in excess of $50,000 to other companies in Virginia, including Coke Raven Coal Company; and the latter annually ships goods valued in excess of $50,000 directly to locations outside the State of Virginia. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Pursuant to a charge filed by the Union on June 6, 1988, a complaint issued on July 21, 1988, wherein it was alleged, among other things, that Respondent had violated its bargaining obligation by refusing to bargain and making unilateral changes which adversely affected the wages, health care, insurance, and vacation benefits of its employees. That case was tried on January 23, 1989, and was the subject of an initial decision issued on July 11, 1989, in which Respondent was found to have engaged in unfair labor practices and was ordered to rescind its unilateral changes and to bargain in good faith. No exceptions were filed and that decision was approved by the Board in an unpublished order dated July 11, 1989. When voluntary compliance was not forthcoming, the Board sought and obtained an enforcing order of the United States Court of Appeals for the Fourth Circuit on January 30, 1990.

To date, Respondent had not rescinded its unlawful unilateral changes. Nor has it recompensed employees for any losses incurred as a result thereof.

On April 10, 1089, 17 miners[1] employed by Respondent went on strike pursuant to a directive from the Union. The Union, 5 days earlier had ordered a strike at mines directly controlled by the Pittston Corporation. The latter strike ended on February 19, 1990; and on March 23 the Union sent a letter to Respondent on behalf of its striking employees advising that ''effective immediately, we hereby make an unconditional offer to return to work.'' Respondent refused, claiming they went out for economic reasons rather than in protest against unfair labor practices. To date, none of the strikers have been put back to work.

It is well established that economic strikers who are also protesting unfair labor practices have a right to immediate reinstatement upon tender of an unconditional offer to return to work. *Larend Leasurlies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975); *Massachusetts Coastal Seafoods*, 293 NLRB 496, 498 (1989); *Decker Coal Co*., 301 NLRB 729 (1991).

Respondent previously has been found to have committed unfair labor practices, and on this record those practices are shown to have been at least a contributing reason for the strike and its continuation. The union president so advised the Local when he authorized the strike, and they remained unremedied during the strike notwithstanding constant reminders in the form of picket signs displayed by strikers at the mine road entrance bearing the legend: ''Unfair Labor Practice Strike.''

I find lacking in merit Respondent's argument that the offer to return was not unconditional because it was accompanied by a statement that ''we expect that our employees will be returning under the terms and conditions of the most recent collective bargaining agreement.'' That language is immediately preceded by the explicit disclaimer: ''By way of information and not as a condition.''

Likewise without merit is Respondent's claim that it was excused from reinstating the striking employees because its belief that some of them had engaged in strike misconduct. Prior to trial, that allegation was not communicated to the strikers or the Union as a reason for nonreinstatement. Further, Respondent offered no evidence linking its striking miners to any misconduct. *General Telephone Co.*, 251 NLRB 737 (1980).

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[1] James L. Ball, Arthur Lee Dye, Charlie W. Dye, Gary H. Dye, Randall Dye, Chester L. Elkins, Eugene F. Elkins, Robert L. Lambert, Bradley R. Miller, Larry C. Plaster, Daniel F. Richardson, Jackie L. Richardson, Gary L. Sparks, Larry W. Sparks, Barry Walls, Roger Whited, and Larry F. Whitt.

CONCLUSION OF LAW

In failing promptly to reinstate the employees named in footnote 1 above, and for the reasons stated above, Respondent violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

In particular, it shall offer the employees named in footnote 1 immediate and full reinstatement to the jobs they held on April 10, 1989, when they went on strike, dismissing, if necessary, any workers hired as replacements. If those positions no longer exist, it shall give them substantially equivalent positions. Reinstatement shall be without prejudice to their seniority or other rights and privileges. It shall also make those employees whole, with interest, for any loss of pay they may have suffered from and after March 23, the day on which an unconditional offer to return was made on their behalf. Backpay shall be computed on a quarterly basis, less interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusion of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, R & H Coal Company, Inc., Jewell Ridge, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate unfair labor practice strikers after receiving their unconditional offer to return to work, including:

James L. Ball	Bradley R. Miller
Arthur Lee Dye	Larry C. Plaster
Charlie W. Dye	Daniel F. Richardson
Gary H. Dye	Jackie L. Richardson
Randall Dye	Gary L. Sparks
Chester L. Elkins	Larry W. Sparks
Eugene F. Elkins	Barry Walls
Robert L. Lambert	Roger Whited
Larry F. Whitt	

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer to the above-named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any workers hired as replacements, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its mining facility near Jewell Ridge, Virginia, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers from whom we have received unconditional offers to return to work, including:

James L. Ball	Bradley R. Miller
Arthur Lee Dye	Larry C. Plaster
Charlie W. Dye	Daniel F. Richardson
Gary H. Dye	Jackie L. Richardson
Randall Dye	Gary L. Sparks
Chester L. Elkins	Larry W. Sparks
Eugene F. Elkins	Barry Walls
Robert L. Lambert	Roger Whited
Larry F. Whitt	

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to the above-named employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, dismissing, if necessary, any workers hired as replacements, and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

R & H COAL COMPANY, INC.